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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/721,871	11/24/2000	Kenneth B. Higgins	5113	4059

7590 10/19/2005

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EXAMINER	
JUSKA, CHERYL ANN	
ART UNIT	PAPER NUMBER
1771	

DATE MAILED: 10/19/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	09/721,871	HIGGINS ET AL.	
	Examiner	Art Unit	
	Cheryl Juska	1771	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *18 July 2005*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *57-80,82-85 and 150-160* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *57-80, 82-85, and 150-160* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

Response to Amendment

1. Applicant's amendment filed July 18, 2005 has been entered. Claims 57, 82, and 85 have been amended as requested. Claims 1-56, 81, and 86-149 are cancelled and new claims 151-160 are added. Thus, the pending claims are 57-80, 82-85, and 150-160.

Claim Rejections - 35 USC § 103

1. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

2. Claims 57-60, 62-67, 69-73, 75-80, 82-85 and 150 stand rejected under 35 USC 103(a) as being unpatentable over US 4,552,857 issued to Higgins in view of US 5,610,207 issued to DeSimone et al. and in further view of US 5,540,968 issued to Higgins as set forth in sections 3 and 4 of the last Office Action.

Applicant has amended independent claim 57 with the limitation that a backing structure is disposed across a lower side of the rebond foam cushion layer. However, this limitation has been previously addressed with respect to cancelled claim 81. As such, the claims are rejected for the reasons of record.

3. Claims 61, 68, and 74 stand rejected under 35 USC 103(a) as being unpatentable over both of the cited Higgins patents and the DeSimone patent as set forth above, and in further view of US 5,616,200 issued to Hamilton for the reasons of record.

4. Claims 151-160 are rejected under 35 USC 103(a) as being unpatentable over both of the cited Higgins patents and the DeSimone patent.

New claims 151-160 limit the backing structure to being attached to the rebond foam cushion by way of an adhesive, preferably a hot melt adhesive. While Higgins '968 teaches bonding the backing structure directly to the foam cushion layer (i.e., direct casting of the foam onto the backing structure), it would have been readily obvious to one skilled in the art to employ an alternative method of bonding the layers. Specifically, since the rebond layer of DeSimone can be a preformed, self-sustained sheet, one skilled in the art would have readily recognized that an adhesive could be employed to bond the rebond foam cushion layer to the backing structure , rather than bonding the layers by direct casting of said foam. Applicant is hereby given Official Notice that art recognized alternative methods of bonding a foam layer to a fabric layer include direct casting of said foam onto said fabric, wherein said fabric acts as a carrier layer, and bonding the foam and the fabric by means of an adhesive, such as a hot melt adhesive. Thus, selection of any of these known equivalent methods of bonding would be within the level of ordinary skill in the art. Therefore, claims 151-160 are rejected as being obvious over the cited prior art.

Response to Arguments

5. Applicant's arguments submitted with the amendment have been considered but are found to be unpersuasive. Specifically, applicant traverses the above rejections by arguing that DeSimone is not directed to carpet tile or even attached cushion broadloom carpet, but rather to a foam pad for carpeting (Amendment, pages 10-11). In response, the examiner respectfully

disagrees. Specifically, DeSimone teaches a rebond polyurethane foam product which is suited for a carpet backing (abstract and col. 2, lines 34-45). DeSimone employs the term "carpet backing" rather than carpet pad, underlay, or other common term used to describe a non-attached foam layer for placement under an installed carpet. As such, the examiner believes the DeSimone reference clearly teaches one skilled in the art that the rebond foam is suited for attachment as a carpet backing layer.

6. Applicant also states, "As described earlier and as agreed to by the Examiner, it would not have been obvious to substitute rebond foam for the virgin foam in a carpet tile." (Amendment, page 11, 1st paragraph). It appears applicant is confusing the examiner's words since the rejection of record is based upon the obviousness of substituting a rebond foam layer as taught by DeSimone for the foam layer of Higgins '857. [Note first Non-Final Office Action mailed January 8, 2003, section 7.]

7. Applicant also argues that one skilled in the art would not remove one of the two stabilizing layers of Higgins '857 (Amendment, page 12, 1st and 2nd paragraphs). In response, it is first noted that the reinforcement layer 158 of Higgins '968 corresponds to the carrier layer 26 of Higgins '857. Secondly, Higgins '968 explicitly states "the reinforcement material 158 may be left completely out of the process" (col. 6, lines 43-49). Thus, applicant's argument is found unpersuasive.

8. Applicant again traverses the rejection based upon the Norton Declaration previously submitted and the accepted wisdom in the art (Amendment, page 12-15). These arguments have been addressed in detail in the last Office Action (mailed April 14, 2005), section 6. As such, the examiner's position on this issue will not be repeated here.

9. With the present amendment, applicant submits "a sample of a commercial carpet tile representative of copying by others" (Amendment, page 15, 2nd paragraph). Said sample is "a rebond foam backed carpet tile made and sold in 2004 in Europe by a competitor of Milliken & Company' (Amendment, page 15, 2nd paragraph). "Applicants respectfully believe this to be sufficient evidence of copying by others which is one of the nonobviousness and patentability factors to be considered." (Amendment, page 6, 2nd paragraph). The examiner respectfully disagrees. First, the sample is not labeled or documented in any way as to the carpet construction and source thereof. Said sample is merely labeled with the present application number. Secondly, without details of the construction of said carpet sample, the examiner cannot possibly verify it as "copying" of the present invention. The Patent Office does not have the capability for analysis of samples. Thirdly, with respect to applicant's evidence of copying, more than the mere fact of copying is necessary to make that action significant because copying may be attributable to other factors (see MPEP 716.06). Alleged copying is not persuasive of nonobviousness when the other manufacturer had not expended great effort to develop its own solution. *Pentec, Inc. v. Graphic Controls Corp.*, 227 USPQ 766. Therefore, applicant's submission of a sample of "copying" is not found persuasive and the above rejections are maintained.

Conclusion

10. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

11. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Cheryl Juska whose telephone number is 571-272-1477. The examiner can normally be reached on Monday-Friday 10am-6pm. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terrel Morris can be reached at 571-272-1478. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

12. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

cj
October 16, 2005

CHERYL A. JUSKA
PRIMARY EXAMINER